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No. 84-1977

In the Supreme Court of the United States

October Term, 1985

TED BERKIC,

Petitioner

v.

MICHAEL CRICHTON, ROBIN COOK, MARVIN MOSS, METRO-GOLDWYN-MAYER/UNITED ARTISTS ENTERTAINMENT COMPANY,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

Is the new derivative rights statue, under 17 U.S.C. §106(2) with its broad protection of the right to create derivative works, especially fictional works, a Congressional mandate meant to be interpreted only in accordance with its plain meaning or has the Court of Appeals erred in interpreting too narrowly the language of the statute:

a. What is the definitive meaning of a "derivative" work?

b. Does only the copyright owner have the right to make all possible variations of the original work?

2.

Has the Court interpreted so narrowly the doctrines of substantial similarity and scenes a faire as to make all defenses

insurmountable, except for an exact duplication of the original work?

3.

Is the audience test the sole determinant of infringement under the new Act or should the Court consider additional tests to determine infringement?

4.

Is the copying of a group or string of ideas in the same sequence equivalent to copying the "expression" of those ideas?

5.

Did the Court below err in granting Respondent's Motion for Summary Judgment when there existed a triable issue of fact raised by the unrebutted expert testimony regarding a substantial "common error" in the two works?

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OPINIONS BELOW

The March 11, 1985, opinion of the Court of Appeals is a disposition by memorandum and is set out in Appendix B to this petition. The December 11, 1983, Finding of Facts and Conclusions of Law of the United States District Court for the Central District of California is officially unreported and is set out in Appendix A to this petition.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1). The judgement of the Appeals Court for the Ninth Circuit was filed on March 11, 1985. Not having been informed of this decision by the Ninth Circuit no petition for rehearing was made. The filing period for obtaining a Writ of Certiorari is (90) ninety days from entry of judgement. 28 U.S.C. §2101 (c).

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8, clause 8 of the U.S. Constitution:

> "The Congress shall have the power... to promote the progress of science and the useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

STATUTES INVOLVED

Pub. L. No. 94-553 (October 19, 1976), 17 U.S.C. § 101 et seq., effective January 1, 1978. Petitioner relies in pertinent part on § 106 (2) of the Copyright Act of 1976:

> §106 "The owner of the copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work.... (2) to prepare derivative works based upon the copyrighted work." (emphasis added)
>
> §101 "A 'derivative work' is a work based upon one or more

pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work'." (emphasis added)

§102(b) "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work."

STATEMENT OF THE CASE

Petitioner is an author. On July 26, 1983, he filed an amended complaint for copyright infringement against the named defendants. A Lanham violation was alleged and pendent state claims. On December 19, 1983, a judgement was entered

against petitioner and on March 21, 1984, a timely appeal was made from an order denying petitioner's application for reconsideration and for alteration of judgement and relief filed under Fed. R. Civ. P. 59 (e) dated February 28, 1984.

INITIAL BASIS FOR FEDERAL JURISDICTION

Jurisdiction of the federal courts was based on 28 U.S.C. § 1338 (a) and §1338 (b).

REASONS FOR GRANTING THE WRIT

The Congress, not the judiciary, was the vanguard of the transformation of copyright from an entrepreneureal right to an author's right. Legislation in 1870 granted to authors alone the right to create new works based on their original works, by granting to them for the first time the exclusive right to translate and

dramatize their works. This act protected more than the form of the author's expression because until that time translations and dramatizations differed in form from the original work. Thus, in deciding infringement, similarity of content was irrelevant; similarity of form was dispositive on the issue of infringement.

The Copyright Act of 1909 added still more and gave to the author the right to "make any other version thereof." At long last form had yielded to content. Copyright would protect the original work and the possible varying levels of creation today referred to as the derivative or adaptation right.

The Copyright Act of 1976 expands the scope of protection and grants to the author (or copyright owner) the exclusive right to create derivative works based upon the original work insofar as it is

"recast, transformed, or adapted."

In this case, and in a multitude of others, the 9th Circuit turned back the hands of time. Its comparison of form alone was dispositive of the infringement issue. Clearly this is an inappropriate analysis because of the numerous ways in which a work may be reshaped. Since copyright law under the new statute protects the right to create variations of an original work it follows then that what is protected is more than the "form of expression." Who would deny that the form of a play is different than that of a novel from which it is derived. Yet the following statement was made by the court in derogation of the plain meaning of the new copyright act. In speaking of the Krofft "intrinsic" test, the Ninth Circuit said that it "is used to determine whether two works are substantially similar in

their "forms of expression." The Court went on to say that the proper question is whether the ordinary, reasonable audience would recognize the defendant's work as a "dramatization" or "picturization" of the plaintiff's work. It supported the statement by citing Litchfield vs. Spielberg, 736 F.21 at 1357.

The Copyright Act of 1976 gave the author of a literary work the exclusive right to "recast, transform, or adapt" it for other versions. The lack of limitation makes the provision the clearest rejection of the form over content view of copyright protection and is but the logical expansionary trend set forth in the prior act of 1909. A view of copyright which protects the original work as well as its possible variations precludes an interpretation of infringement based solely on form.

1. THE IDEA EXPRESSION DICHOTOMY PROTECTS THE IDEAS EMBODIED IN WRITINGS

Until the Copyright Act of 1976 courts attempted to apply the same standard of protection to two very different kinds of copyrighted material: practical writings, whose concern was the conveying of information and their functions, i.e., textbooks, contracts, deeds, instruction manuals, and artistic writings, whose concern is the showcase of creative effort, i.e., novels, short stories, plays. This distinction between the practical and the artistic is the premise upon which the new copyright act is based. Courts have no difficulty when determining the protectible aspects of practical writings since the ideas expressed and the form of expression are

easily separated. Baker vs. Selden, 101 U.S. 99 (1879) is illustrative of practical writings. The case concerned a book explaining a new accounting sytem. The idea was the system itself (unprotectable) while the words used to describe it were its expression (protectable). The book could not be reprinted without consent, but anyone could set up his accounts in following the system. The "use" and the "explanation" were easily separable. The idea/expression dichotomy was workable as to practical writings and easily distinguished. Not so with artistic writings. A rule applied with consistency to practical writings created disparate results in artistic writings because of the near impossibility of separating the idea from the expression. Baker never intended its test to apply to artistic writings in the same way.

The new statute grants an author the exclusive right to prepare and create derivative works based on his original copyrighted work. At the same time it also protects the idea embodied in that original work. And this it does without offending either Baker or the new statute.

2. THE DERIVATIVE WORKS STATUTE IS DIRECTED PRIMARILY TO ARTISTIC WRITINGS

§101 refers specifically to dramatization and fictionalization, terms directed solely to artistic writings. It also refers to translations, abridgements or condensations. In the latter, a new work has not been created. Form, however, has been altered but the content remains the same. Not so in the former. Both form and content are altered, sometimes substantially. In effect, a new work is

actually created. Thus, while both practical or artistic writings may be subject to translation, abridgement or condensation, it is equally true that musical arrangements, motion pictures, sound recordings, and art productions further emphasize the artistic direction of the statute. This can only mean that the ideas protected by the derivative works statute are the ideas embodied in artistic writings. Upon reflection it becomes obvious that Baker and/or § 102 (b) speaks only to practical writings. Baker holds the non-protectibility of ideas vis a vis practical writings. The language of § 102 (b) indicates that it refers only to ideas embodied in practical writings: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, etc." The statute is framed in words characteris-

tically associated with practical writings. See Derivative Works and the Protection of Ideas 14 GA. L. Rev. 794 (1980). (This note won first prize in the 1980 Nathan Burkan Memorial Competition sponsored by ASCAP and supports the need for guidelines in determining infringement under the new derivative rights statute.)

3. A STATUTORY CONSTRUCTION OF THE NEW COPYRIGHT ACT IS REQUIRED IN ACCORDANCE WITH ITS PLAIN MEANING

The failure by the legislature to enumerate anything related to artistic writings or literary works is yet a further indication that the protection of ideas, in a limited sense, does extend to ideas, embodied in artistic writings. Upon clarification as to the kinds of copyrightable writings the Baker decision addresses, the lack of conflict becomes

clear. The Congress which drafted the statute did so in express recognition of a broad definition of a derivative work. Ultimately, the district court ignored the statute. The Ninth Circuit cavalierly showed its contempt for the statute by coming down on the side of defendants in an arrogant display of its disdain for authors by proclaiming counsel for plaintiff's argument as being "frivolous" and therefore unmeritorious and a waste of the court's time.

The Ninth Circuit is no longer "credible." And as Harry Truman once said, "The buck stops here."

4. A COMPARISON OF FORM ALONE CAN NEVER BE DISPOSITIVE OF A PLAGIARISM CASE

Because of the many ways in which a work may be reshaped the condemnation of derivative rights by the Ninth Circuit in

a memorandum opinion footnote belies the Circuit's "friends of the court" favoritism. A comparison of form alone can never be dispositive of a plagiarism case. A comparison of content will always be required when form is not identical. In fact, it is so obvious that one can only wonder in amazement at the recent decisions of the Ninth Circuit. The right to create variations must protect more than the form of a work else these "variants in form" would produce a different work even where the content was substantially the same. All the plagiarist need do is substitute different forms with equivalent meanings. The real question concerns the "use" the alleged plagiarist makes of the plaintiff's work. Certainly only a fool would copy a prior work verbatim. Yet the act of pirating another's work has escalated to epidemic proportions -- not

by literal taking but by "disguised" piracy raised to the level of a "high art." When the material alleged to have been taken is "disguised" in a later publication (or movie) by change of language, form, character, sex, locality, then the determination of such "recasting" (derivation really) is attended with greater difficulty. Abuse of the law was running rampant and Congress tried to correct the mischief by the Copyright Revision Act of 1976, by eliminating some language, adding other language, and by broadening the scope of copyright.

The Ninth Circuit did great violence to a basic tenet of statutory construction, i.e., to be guided by the unambiguous language of a statute. In Litchfield vs. Spielberg, 736 F.2d 1352, by ignoring the legislative history, the Court relied solely on itself and its belief and

declined to analyze the relevant section of the statute. The Ninth Circuit thus unmistakably abandons the language of the statute as the vehicle of finding infringement. "The words of a statute are to be read in their natural and ordinary sense, giving them a meaning to their full extent and capacity, unless some strong reason to the contrary appears." Miller vs. Robertson, 266 U.S. 243, 250 (1924).

5. PROTECTION OF SUBSTITUTE FORMS ALLOWS A PLAGIARIST TO EVADE LIABILITY BY SUBSTITUTING FACTUAL AND TECHNICAL EQUIVALENTS

It is suggested that the copyright statute granting the exclusive right to prepare derivative works "based upon" an original work actually protects the "arrangement of ideas" embodied in the prior work. As has been seen, only two

basic types of copyrightable writings exist -- the practical and the artistic. Thus, when the aggregate of ideas is strung together in a certain sequence it is the combination of these ideas which invades not the "form of expression" but the very expression itself. The derivative works statute makes a "string of ideas" in the aggregate the equivalent of expression. The idea/expression dichotomy cannot have the same application to artistic writings as it does to practical writings. This must be so because it is impossible to separate idea from expression in artistic writings with any degree of confidence. (See Fink vs. Goodson-Todman Enterprises, Ltd, 9 Cal. App. 3d 996, 88 Cal. Rptr. 679 (1970) for an excellent argument conceptually concerning technical and factual equivalents as substitute infringing forms. Though brought

up in a contractual context the case clearly anticipates the new derivative rights statute.)

I.

THE COPYRIGHT LAW IS IN A STATE OF CHAOS

The greatest single source of confusion in the area of intellectual property law for authors seems to be the simple question, "WHAT IS SUBSTANTIAL SIMILARITY?" Terms like "idea," "expression," "sequence of events," "patterns test," "abstractions test," and "scenes a faire" all have been used in an attempt to define the parameters of copyright law. Although copyright protection for original writings has been with us since the founding of the nation courts have had little sucess in determining its boundaries. Copyright of original writings is, of course, the embodiment of both idea and expression. It

is more than information, more than facts, more than ideas. It is the way of expressing those original ideas. But, more often than not, in attempting to comprehend it the Court has found itself, like Alice, on the wrong side of the Looking Glass, talking to the White Knight:

"The name of the song is called 'Haddock's Eyes!'"

"Oh, that's the name of the song, is it?" Alice said, trying to feel interested.

"No, you don't understand," the Knight said, looking a little vexed. "That's what the name is <u>called</u>. The name really <u>is</u>, 'The Aged Aged Man'."

"Then I ought to have said 'That's what the <u>song</u> is called'," Alice corrected herself.

"No, you oughtn't: that's quite another thing! The song is <u>called</u> 'Ways

and Means': but that's only what it is called, you know!"

"Well, what is the song then?" said Alice, who was by this time completely bewildered.

"I was coming to that," the Knight said. "The song really is 'A Sitting on a Gate': and the tune's my own invention."

-- Lewis Carroll

"Through the Looking Glass"

A. THE ROOTS OF CONFUSION

Petitioner will now deal with the mercurial term "substantial similarity" even though the new Copyright Act nowhere mentions it and the United States Supreme Court has never adopted it. The legislature apparently considered it an undesirable, perhaps unfortunate, term because it was so vague, and because the many attempts to apply it seem always to have

resulted in an unmitigated disaster for authors. In reality, the term is subverted in the case law both in its interpretation and in its application. One such subversion was caused by Judge Yankwich in the case of Schwarz vs. Universal Pictures Co., 85 F. Supp. 270 (S.P. Cal. 1945). In that case the judge created the unnecessary scenes a faire doctrine which became merged with the substantiality doctrine. Substantial similarity was no longer substantial similarity because certain scenes, according to the Court, were indispensable or necessary in the treatment of a particular topic. It is probably the one doctrine that has become the major defense for deliberate plagiarists. In fact, it has become so damaging to authors that judges and defense lawyers rely on the doctrine almost exclusively -- particularly in Southern

California -- the heart of the movie industry. Judicial sleight of hand has transformed the doctrine into a sporting event much like a soccer game with judges and lawyers "goal tending" for the motion picture industry. Indeed, one commentator referred to the doctrine as "judicial legerdemain" and called for its abolition. See Tamura, Copyright Infringement: An Argument for the Elimination of the Scenes a Faire Doctrine, 5 Comm/Ent L.J. No. 1 at 147. As between the substantiality doctrine and the scenes a faire doctrine, it is in this area that the greatest problems occur.

B. SUBSTANTIAL SIMILARITY AS A TERM OF ART AND ITS MEANING UNDER THE DERIVATIVE RIGHTS STATUTE

Rooted in tradition, the doctrine is used to prove the complicated question of

"illicit copying." To establish this, a plaintiff must show either (1) that defendant had access to the work, and that substantial similarity exists between the works, or (2) that the similarity between the works is "striking," 3 M Nimmer, THE LAW OF COPYRIGHT § 1303 (A), at 13-15 (1978). "Striking similarity may substitute for proof of access which is only to say that defendants had, at least, a reasonable "opportunity to copy." See Musto vs. Meyer, 434 F, Supp. 32, 34 (SDNY 1977). A striking similarity, however, is some characteristic present in both works that precludes the possibility that a defendant has independently arrived at the same result. Id § 13.02 (B), at 13-12. An example would be anything idiosyncratic, even a brief phrase, if it were considered unusual enough in its context. See Heim vs. Universal Pictures Co., 154

F.2d 480, 488 (2d Cir. 1946).

Substantial similarity, then, is analogous to ownership of land and trespass. For example, the rights of landowners includes the airspace over the land and its potential use. An invasion of that space would be considered a trespass. In the copyright context, substantial similarity would be found if the right to prepare derivative works was invaded. Because virtual identity or exact duplication is not required, plaintiff's copyright is of great value. This is so, at least, in theory because the courts have ignored derivative rights and the authors' "space." It follows, then, that the manner in which courts test for substantial similarity in a derivative context, is of vital importance to authors and to the cultural growth of the nation as a whole.

The lower courts need guidance by

this high court in correctly defining and clarifying the extent of legal use of a prior work in creating other works. A final interpretation of the derivative rights statute and of what constitutes infringement under its language is both special and important and justifies the high court's review of the record in order to correct misconceptions about copyright as well as the proper application of the idea-expression distinction where derivative uses are concerned. A better formulation of the dichotomy and its application needs more than mere lip service. One suggestion might be that the court be required to assess the alleged similarities presented by the plaintiff. To intentionally ignore crucial similarities in structure, content, and even dialogue, so that the public wonders why plaintiff even brought the suit, is intellectually dis-

honest and ignores the evidence. It achieves only one result -- a distrust of the court system itself. By responding to the plaintiff directly these very important issues can be resolved. To do otherwise is to make a mockery of justice. This high court must not countenance such behavior. It must therefore show the way.

C. LACK OF INDEPENDENT CREATION IS PRESUMED FROM DEFENDANTS' DUPLICATION OF A SUBSTANTIAL ERROR BECAUSE THE FURTHER PRESUMPTION IS THAT ALL SIMILARITIES ARE A RESULT OF COPYING. THE ISSUE OF ILLICIT COPYING SHOULD HAVE BEEN A JURY QUESTION

Arnstein vs. Porter, 154 F.2d 464 (2d Cir. 1946), represented the most important breakthrough for spectator reactions in measuring substantial similarity in copyright cases. It was this case that recog-

nized that it is the actual audience, and not some obscure notion of an ordinary reasonable person, that provided the economic incentive to create. Thus, when courts speak of the "ordinary lay observer" or "audience" test, proper weight must be given to the uses for which the work is intended, "especially the scrutiny that observers will give to it as used." This is exactly what the lower courts failed to do in the instant case. The lower courts spoke of vast differences after careful examination. Because of those differences the Court believed that a jury would not perceive that one work was the result of another, and if it did, as a matter of law, the jury would not be allowed to so conclude. The scrutiny of the lower courts should have involved not an analysis to determine improper appropriation but an analysis more properly

from a distance, as it were, in order to determine if a triable issue of fact did exist. Thus, some of the differences between the works would have tended to "fade away." Another error of the lower courts was its failure to consider and to compare the similarities in light of the alleged "common error" incorporated into the two works, certainly a vital factor in determining whether one work was illicitly copied one from the other and also whether the later work was derived from the former. Thus, when access is conceded and a common error is shown, and expert testimony is offered, unrebutted as it were, the presumption must be that the later work is not an independent creation. Access and lack of independent creation are presumed from defendants' duplication of an error. Sherry Manufacturing Company, Inc. vs. Towel King of Florida,

Inc. (S.D. Fla. 1983) (No. 81-1687-CIV-ALH)

In sum, the Court cannot ignore an alleged common error when presented with expert testimony. Without the "error" a Court might even reach the conclusion that the origin of the later work is the result of independent creation. Without the error the Court might even reach the same conclusion on the very issue of substantial similarity. But where, as here, independent creation is disproved, a Court cannot lose itself in a justification of its "use" by paying lip service to the overall aesthetic appeal as being entirely different as to both ideas and expression, just to achieve a desired result. Its failure to deal with an important aspect of the case is to favor one party to the litigation over the other. This error, unrebutted, standing alone, was sufficient

evidence creating the necessary triable issue of fact as to the degree of similarity necessary to prove infringement. The only question left was whether reasonable minds could differ on the issue of substantial similarity. The Court held that the following summary of both works conclusively proved that the two works were neither substantially nor strikingly similar. The incorrect analysis of the lower courts demonstrates their failure to analyze the particular attributes necessary in determining the potential of aesthetic appeal to their ultimate audience. They incorrectly concluded that reasonable minds could not differ on the following attributes.

II.

ANALYSIS OF THE TWO WORKS

Both works begin with the same scene and setting, end with the same scene and setting, and have a multitude of sequential similarities in between. In each, the main character and lover have arguments surrounding the "ism" affecting the main character -- sexism or racism. Each main character is a recent graduate who becomes intrigued by a series of unexplained, mysterious occurrences happening to young, healthy victims, and begins to investigate on his/her own time, trying to determine "why." Each is advised by his/her lover and colleagues to stop investigating, it could hurt their careers, but each continues, certain there is some unknown "link." Each is given routine explanations for what are apparently unrelated incidents, which neither accept.

Each seeks and finds a common link among all the victims, with the early-revealed fact that all victims were healthy being so obvious that its significance is not realized at first. Both eventually discover that an underground organization fronting as a medical research project has been surreptitiously compiling medical information on a group of medical patients, who are commonly linked. In each work, the organization then abducts the victims by illegal means; in each, they thereafter ship the victims to an ominous, secluded, private, heavily guarded hospital where the victim-donors are kept in a helpless condition until their usable body parts are needed, at which time they are operated upon, their usable parts removed, and sold to transplant bidder-recipients. Each has thugs to do the violent dirty work. In each, the head of the scheme is

a man appearing to be in his fifties, intelligent-looking and well-dressed; in each he makes attempts at eloquent oratory in support of the scheme which is allegedly for the good of mankind, but each obviously has a twisted view of the good he is doing, and in the end, is not afraid or bothered by making the decision to put the main character on the operating table to become the next donor-victim. In each, it is obvious that the profit motive is really driving the scheme, since huge amounts of money are being bidded for organs by wealthy individuals.

Each has several of the most important, suspenseful scenes set in the private hospital, particularly their respective denouements. Each has repeated scenes between the main character and his/her lover in their homes, where each argue about the main character's involvement in

the mystery and how it affects their jobs, and they haggle over their respective relationships and "isms." Each has several important plot-furthering scenes in the lush offices of the head of the scheme. Each has multiple scenes in medical settings, and including doctors and nurses. Each has an omnipotent organization looming over the characters, flying body parts about, gathering and transmitting medical information by sophisticated technology; intimidating, yet all the while presenting itself as a benevolent force, which the twisted members of the organization believe.

A number of small touches are also the same -- each has a doctor named George who is suspected of involvement, but is not involved; each raises issues of doctor-patient confidentiality; each touches upon the emotional subject of

therapeutic abortion; each raises the complaint that doctors don't really care about patients, but are interested primarily in the stock market and the like. Finally, an incredible similarity is the fact that in both works, four-group tissue typing information is essential (although no such tissue typing exists in reality, a unique common error and fiction, discussed in greater detail below.)

Defendants would have this Court, and the court below, believe that a character is no more than his/her physical description -- black or white, male or female -- rather than a sum of motivations, ambitions, relationships, personality traits, and the like. Defendants would assert that settings are no more than geographical locations -- Boston, Los Angeles, New York -- rather than backgrounds for the action of the story, or the environment:

medical rooms and surgery rooms, hospitals, secluded sinister "research" facilities where transplant operations take place, apartments of characters, offices of characters, the beach, the car.

Plaintiff has demonstrated the similarity between the settings and characters of the two works, and between the two plots, with which the court below agreed. C.R. 306. The concepts -- one person battling alone against quasi-medical establishments to end a series of transplant murders -- are clearly the same. The feel of the works -- a struggling young newcomer investigating the perplexing mystery, the infusion of doctors, nurses and hospitals with a sinister quality instead of the trusted quality expected -- is the same.

At the very minimum, the above demonstrates that there are issues as to which

reasonable minds could differ. For this reason, the Court should reverse and permit the action to proceed to discovery.

III.

UNREBUTTED EXPERT TESTIMONY INTRODUCED BELOW WAS SUFFICIENT TO RAISE THE NECESSARY TRIABLE ISSUE OF FACT.

The burden of proof as to independent creation had shifted to the defendants. They failed to meet that burden.

Attached to Plaintiff's Supplementary Points and Authorities opposing the summary judgment motion was the Declaration of Djordje Milicevic. C.R. 300. Mr. Milicevic set forth his expert qualifications, detailing his extensive background as a writer in the motion picture industry, and his exposure to numerous scripts, plays, stories, and the like. Mr. Milicevic then detailed that he was

familiar "in great detail (with) the characters, sequence of events, plot and story" of Reincarnation, Inc., and had read the book and seen the film Coma.

His conclusions: "I was struck by the remarkable similarities between the plot, character and story elements" between the two works, the story "was the same," and Coma was "very similar" to Reincarnation. Mr. Milicevic perceived "unusual similarities between Reincarnation, Inc. and the plot and characters, story, etc. of Coma. ... Thus, my observation and conclusion that Coma and Reincarnation, Inc. bore distinct similarities to one another was based upon my own personal knowledge of the two works." C.R. 301-302.

As noted, under the Krofft extrinsic test, expert analysis is proper. Liberally construing plaintiff's evidence, and

strictly construing defendant's evidence, as required, McHenry vs. Ford Motor Co., 269 F.2d 18 (Mich. 1959), this alone raises a triable issue, since it clearly demonstrates that reasonable minds may differ. The court's function is not to decide factual issues, but only to determine whether there are factual issues to be tried. Arrington vs. City of Fairfield, Ala., 414 F.2d 687 (Ala. 1969); Gross vs. Southern Ry. Co., 414 F.2d 292 (Ga. 1969). The court decides a pure question of law on such a motion, and is not permitted to weigh the evidence or judge the credibility of witnesses. Neely vs. St. Paul Fire and Marine Ins. Co., 584 F.2d 341 (9th Cir. 1978).

Defendants did nothing to rebut this declaration evidence, as they were required to do. Rowan vs. U.S., 219 F.2d 51 (5th Cir. 1955). If the affadavit and

the facts therein are not contradicted, their veracity is admitted. Morrisson vs. Walker, 404 F.2d 1046 (9th Cir. 1968). In addition, the court below had before it the Declaration of Reuben R. Merliss, M.D., a doctor board-certified in internal medicine. C.R. 435. Dr. Merliss noted that, although Coma contained several elements pertaining to medical practice and procedure, and was predominantly accurate, it had one peculiar "medical fiction" -- the references therein to a four-tissue grouping to make for a good transplant match. This is a medical fiction it shared in common with Reincarnation. The courts have regarded such common errors in two works as the strongest evidence of piracy. Central Tel. Co. of Va. vs. Johnson Pub. Co., Inc., 526 F.Supp. 838 (D. Colo. 1981); Southwestern Bell Tel. Co. vs. Nationwide Independent Directory

Serv., Inc., 371 F. Supp. 900 (W.D. Ark. 1974).

The screenplay for Coma was written by a doctor (Crichton) allegedly based on a book by a doctor (Cook). Although other medical detail was accurate, the work Coma shared in common the layman's error laid out in Reincarnation that transplant tissue matching is a four-match proposition. (See pages 16, 36-37 of Reincarnation, compared with Reel 2A, page 6 and Reel 5B, page 10 of Coma script.) The striking peculiarity of this one glaring error is essentially unrebutted.

Counsel for defendant MGM apparently consulted a dictionary and an encyclopedia, and made unverified, unqualified and incorrect statements therefrom that attempted to rebut the qualified, verified statement of a trained, board-certified internist, an expert. A reasonable

person, considering the doctor authors and the attempts to add medical detail for authenticity in parts of Coma, and considering the author of Reincarnation, a layman, could not help but be perplexed and highly suspicious of why the former duplicates a simple medical error in the latter. This error raises issues of qualitative taking.

Defendants did not come forward with any evidence of a proper nature to rebut the factual inferences raised by plaintiff's two expert affadavits, as they were required to do. Rowan, Morrison, supra. The court was not permitted to disregard or weigh this evidence. Neely, supra. Triable issues were thus raised and not rebutted, and this High Court should reverse and remand to allow the action to proceed, so that it may in fact be determined how much of plaintiff's work was

used by defendants.

IV.

THE CONFLICT IN THE CIRCUITS

A. THE SECOND CIRCUIT

The Arnstein Court, supra, contemplated that the substantiality doctrine was the test of "improper appropriation." The substantiality similarity test provided that only plagiarism of a substantial nature ought to be accorded judicial cognizance. Thus, absent substantial similarity, courts have denied a remedy despite a proven plagiarism. The Arnstein test, based on the substantiality doctrine made improper appropriation that degree of taking evidenced by a high degree of similarity. Such an interpretation of Arnstein was espoused by Judge Leonard Moore of the Second Circuit who wrote that "[T]he... statement in Arnstein

was merely an alternative way of formulating the issue of substantial similarity." Ideal Toy Corp. vs. Fab-Lu Ltd., 360 F.2d 1021, 1023 N.2 (2d Cir. 1966). That Judge Moore was correct in his interpretation is supported by Heim vs. Universal Pictures Co., 154 F.2d 480 (2d Cir. 1946), which is a restatement of Arnstein, wherein the same Court referred to "copying so 'material' or 'substantial' as to constitute unlawful appropriation." Id. at 487. Thus, it is abundantly clear that by "improper appropriation" the Arnstein Court meant not copying of original protectible expression, but rather substantial copying by a high degree of similarity.

B. THE NINTH CIRCUIT

The Ninth Circuit devised a new test for copyright infringement called the

Krofft test which derives from the case of Sid & Marty Krofft Television Productions, Inc. vs. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977). While Arnstein was an attempt to judicially modify the so-called "audience test" to render it workable and predictible while retaining necessary continuity in copyright law, Krofft, however, made a serious break from tradition. The Court of Appeals for the Ninth Circuit recently interpreted the Arnstein opinion as being the copying of an idea's particular expression. "It is an axiom of copyright law that the protection granted to a copyrighted work extends only to the particular expression of the idea and never to the idea itself," said the Court. It explained its interpretation of the bipartite Arnstein test in terms of "extrinsic" and "intrinsic tests." Although such a test perhaps accurately

reflects the proper method of applying Arnstein, the Court erred in its interpretation of the test itself. Krofft overlooked the fact that Arnstein concerned musical plagiarism, a rather special breed of plagiarism where the idea-expression dichotomy does not pertain. Music is an abstract language essentially devoid of intrinsic meaning and hence perceptible ideas. Unlike speech, music does not convey specific ideas susceptible of discernment by its audience. To be sure, music engenders impressions among its listeners, yet these impressions are so intangible as to vary from person to person and so general as to be uncopyrightable. Accordingly, it is clear that the Arnstein Court could not have meant copying of an idea's particular protectible expression by improper appropriation and that the Krofft Court erred in so

concluding.

The Arnstein test has never been overturned by the Second Circuit. Under Krofft, however, it was believed that the test of the Ninth Circuit would expand the domain of the trier of fact, and would greatly restrict the role of the Court. In reality Krofft did just the opposite. According to Nimmer, the only issue under the "extrinsic" test is that of idea similarity. Since the court is looking for objective similarity of idea and since, in almost all copyright litigation the plaintiff will not file an action unless there is at a minimum some similarity of ideas, under Krofft the summary judgement technique was curtailed. 3 M. Nimmer at 13.03 [E] [8]. That should have been the effect of the bifurcated test in Krofft. The Court stated at 1164:

> If there is substantial similarity in ideas, then the

> trier of fact must decide whether there is substantial similarity in the expression of the ideas so as to constitute infringement. (Emphasis added.)

That courts have had difficulty discerning the protectible from the non-protectible in artistic works is made apparent by the number of cases reversed on appeal on the issue of what is idea and what is expression. Courts have been unanimous in their ability to decide infringement cases regarding facts, history, or the like, as it concerns practical writings, but the widely divergent opinions when applying the test to artistic works belies the efficacy of such a test. Different courts in different circuits have a different conception of how the labels "idea" and "expression" should be applied.

The following cases make for excellent examples of how the idea/expression

dichotomy produces different rulings on the same facts all in the field of artistic expression. The three opinions in the case of Harold Lloyd Corporation vs. Witwer, 46 F.2d 792; Bradbury vs. Columbia Broadcasting system, Inc., 287 F.2s 478 (2nd Cir. 1961) (for plaintiff, reversed on appeal); Sheldon vs. Metro-Goldwyn Pictures Corporation, 81 F.2d 49, (2d Cir. 1926)(for defendant, reversed on appeal); Dymow vs. Bolton, 11 F.2d 690 (2d Cir. 1926)(for plaintiff, reversed on appeal); Twentieth Century-Fox Film Corp. vs. MCA, Inc., 714 F.2d 1327 (9th Cir. 1983), (for defendant, reversed on appeal).

That the idea/expression dichotomy has limited application is further evidenced by its impossibility of application to musical compositions (outside of lyrics, music does not deal with ideas) and/or video games (because they are

"mixed works"). The Krofft standard of review is impossible to apply because, in artistic works, once the idea is extracted from the work the separation of the ideas would necessarily include inseparable expression. It is virtually unrealistic to make a preliminary separation of the expressions from ideas, and then allow a trier of fact to consider only expressions. Such a separation would destroy not only the work as a whole but the "quintessential essence" of the work as well. This is true also of audio visual works where the character or essence of a work is determined by the interaction of separate literary, aural and visual elements. See Berman and Boxer, Copyright Infringement of Audio-Visual Works and Characters, 52 S. Cal. L. Rev. 315 (1979).

C. THE THIRD CIRCUIT

The Third Circuit in Universal Athletic Sales Co. vs. Salkeld, 511 F.2d 904 (3rd Cir. 1975), does not base its test on the idea-expression dichotomy. It does, however, retain an analytic and non-analytic approach. Id at 907. In the first step the trier of fact may resort to analysis and dissection to determine whether Defendant has copied plaintiffs work. In the second step, the trier of fact will "concentrate upon the gross features rather than an examination of miniutiae" to determine whether "the copying went so far as to constitute improper appropriation."

The third Circuit, in Midway Manufacturing Co. vs. Bandai-America, Inc., 546 F. Supp. 125 (1982), recognized the need for analysis under both prongs of the bifurcated test. The Third Circuit, in

other words, has rejected the ordinary observer's subjective reaction on the issue of improper appropriation.

V.

THE CONFLICT IN THE CIRCUITS INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW AND NEEDS TO BE SETTLED BY THIS COURT

Since Krofft, there exists a conflict between the Circuits as to how to arrive at substantial similarity. Because of that conflict, summary judgement has become commonplace in copyright decisions particularly in the Second and Ninth Circuits -- the heart of the entertainment business. Krofft would apply the idea/expression dichotomy to all works. The predecessor to Krofft did not use any such test and infringement was held whenever access was proven and a high degree of similarity existed between the infringing

work and the prior work. Thus Arnstein sought not to unnecessarily complicate the law. The key to infringement was similarity of content such as would be apparent to an ordinary observer. The Third Circuit, however recognizing some of the dangers of the ordinary observer test, rejected it as the final arbiter. Perhaps this is so because misuse of the rule in different media was becoming readily apparent or perhaps because it recognized the changes that would be required when a work is transformed from one medium to another. The Seventh circuit in the case of Atari vs. North American Phillips Consumer Elecs. Corp., 672 F.2d 607 (7th Cir. 1982), is perhaps the most sophisticated decision to date recognizing that a change in medium mandates substantial changes in expression. Wide departures or variations from the pre-existing work must

be taken into account if derivative rights are to be given their intended full effect. On the other hand the Ninth Circuit has put forth the proposition that intentional plagiarism, if properly concealed or camouflaged, protects even a deliberate plagiarist. See vs. Durang, 711 F.2d 141 (1983).

VI.

PROTECTION OF ARTISTIC DERIVATIVE USES

The derivative use statute does protect ideas and can best be demonstrated by example. An author writes a short story. The statute gives him the exclusive right to prepare derivative works based upon his short story. The author decides to write a play of his short story. The changes necessary to write a play are more extensive than the mere addition of stage directions. In Dam

vs. Kirk La Shelle Company, 175 F. 902 (2d Cir. 1910), the prestigious Second Circuit Court of Appeals held that unless the statute protects any adaptation of the story, it is wholly ineffective. Thus, even substantial changes may be protected under the statute. Simonton vs. Gordon, 12 F.2d 116 (SDNY 1925), also recognized that substantial differences must of necessity occur in any adaptation from one medium to another. The necessary changes may be greater still when an author adapts his short story to film. See Bradbury, supra, 287 F.2d 478 (9th Cir. 1961).

VII.

THE COPYRIGHT ACT PROTECTS A WIDE RANGE OF POSSIBLE AND SUBSTANTIAL VARIATIONS ON THE ORIGINAL WORK

The focus of any infringement suit

must be the relationship between the two works, i.e., is the second work a result of the first work. The derivative rights statute emphasizes this concept by extending the protection afforded a work to a wide range of possible and substantial variations. See House Report at 62. The statute protects more than the form of the original work and precludes invasion of the range of possible derivative works. To that extent the statute restricts the use of ideas embodied in the copyrighted work but only as it applies to artistic writings. That the derivative use statute is drawn in terms of the arts is evidenced by the statutes definition. It is one more step away from the time when a change in form was a change in expression. The provision for the protection of derivative uses is a protective shield for all authors of artistic endeavors. Protection

of ideas embodied in fictional works does not conflict with Baker or § 102(b) because they address themselves only to practical writings. While artistic writings are not discussed in Baker, the Court's opinion in an overlooked passage, exempted other art forms from the severity of its holding:

> Of course, these observations are not intended to apply to ornamental designs, or pictorial illustrations addressed to the taste. Of these it may be said, that the form is their essence, and their object, the production of pleasure in their contemplation. This is their final end. They are as much the product of genius and the result of composition, as are the lines of the poet or the historian's periods.

The Court went on to contrast the final end of contemplation and enjoyment with the final end of practical writings, which is use. The final end of artistic writings is to be read and enjoyed. It is equally true today.

On appeal in this case the Ninth Circuit applied the scenes a faire doctrine -- (scenes which must be done because they are inherent in a situation) -- and determined that the similarities between the works were merely "incidents which flow naturally from a basic plot premise." The court reasoned that only scenes a faire had been taken, but never compared the separate elements individually to lend credibility to its holding. The case law has recognized that minute alterations of expressions in a prior work will not be afforded protection. See Nichols vs. Universal Pictures Corp., 45 F.2d 532 (9th Cir. 1956). As a result of the doctrine and its abuse, there cannot be anything new under the sun. Yet Krofft

clearly states that, in order to satisfy the extrensic test, the Court need only find a similarity of idea. A case illustrative of this point is Twentieth Century-Fox Film Corp. vs. MCA, Inc., 714 F.2d 1327 (9th Cir. 1983), wherein the Court used the scenes a faire doctrine reasoning that the idea of a robot was unprotectable and that any expression of that idea was unprotectable as a scene a faire in the science fiction genre. With respect to the substantial similarity test the Court said:

> "To the extent that both the Universal and Fox characters in question embody the idea of a small robot in a science fiction setting, they are not protectable."

The Appeals Court for the Ninth Circuit could not distinguish idea from expression. It considered the idea of a robot as equivalent to expression of a robot. The Court incorrectly reasoned

that if the "idea" of a small robot in a sci-fi setting is unprotectable, then any expression connected with that idea would also be unprotectable. Once again, the Court failed to realize that one can have protectable expression originating from an idea. Their error is one in logic because it is well settled that two expressions of the same idea may still infringe each other.

The value of Krofft at this time seems questionable. Though it is cited in some other circuits, one writer criticizes the process because the case does nothing to "shed light" on the "audience test" as it relates to sophisticated piracy and unfamiliar media. See Knowles & Palmieri, Copyright Infringement Actions: the Proper Role for Audience Reactions in Determining Substantial Similarity, 54 S. Cal. L. Rev. 385, 410 (1981). The goal of

Krofft was an attempt to create a more objective and thus more accurate procedure in eradicating confusion about copyright protection. In reality it has done the opposite. All this wrangling about "extrinsic" and "intrinsic" seems unnecessary in light of the efficacy of Learned Hand's so-called "abstraction" test" or Chafee's refinement of that test called the "patterns test." Those traditional tests focused on the act of copying. The Krofft test, like the scenes a faire doctrine, shifts the focus to include extraneous factors such as the notion of the public's view of ideas and the ability of the public to notice alterations. In truth, the Krofft case is questionable because it was decided under the old act, without reference to the new statute. Under Krofft cases will rarely go to jury, and furthermore, a test which allows no expert

testimony before the trier of fact in technical fields such as music, computers, or audio-visual works, belies its long range usefulness. This, coupled with the Ninth Circuit's belief that there is "rarely anything new under the sun," is more correctly the absolute destruction of existing law.

A. ANY REASONABLE INTERPRETATION OF THE DERIVATIVE RIGHTS STATUTE THAT DIFFERS FROM THE NINTH CIRCUIT'S VIEW IS NOT FRIVOLOUS AS THAT COURT BELIEVES

The Ninth Circuit has raised questions of frivolity and sham directed at petitioner and his counsel. The attitude is that every suit against the entertainment industry has little behind it except harassment. But petitioner asks that they be cautious in bandying about such deri-

sive terms. Today's frivolity may be tomorrow's law, and the law often grows by an organic process in which a concept is conceived, then derided as frivolous (as in this case) then accepted as theoretically tenable (though not yet interpreted as such), then accepted as the law. The Court must be cautious not to discourage attorneys from advancing concepts or to harass and penalize them for doing so. How might the law have developed if, prior to 1954, and contrary to settled Supreme Court case law, an attorney had not espoused that separate but equal was not equal at all.

Finally, all this wrangling that has resulted from the Krofft test as to what is idea and what is expression without defining those terms is really so much gobbledygook. The fact remains that there is something terribly wrong not with our

copyright laws but with our courts, and the truth is that a primary right of recovery for infringement of a copyrighted work without the protection afforded plaintiff's under the derivative rights statute of § 106 (2) is just quite simply non-existent.

Again "the buck stops here."

CONCLUSION

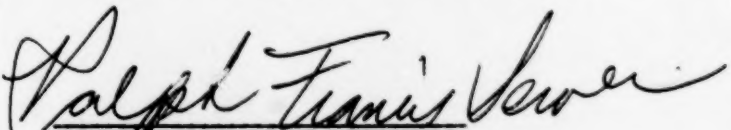
The Supreme Court's goal of protecting the economic incentive to create and disseminate ideas finds long awaited nourishment in the very recent case of Harper & Row Publishers, Inc. vs. Nation Enterprises, Inc. (83-1632). It is a boon to authors and publishers alike who need First Amendment protection if they are to continue to flourish in their creative efforts. The benefit to authors and to the general public at large is obviously

dependent one on the other and can best be served by preserving that incentive. The Supreme Court believes it. This petitioner believes it.

This petition for Writ of Certiorari should be granted.

Dated: June 7, 1985

Respectfully submitted,



RALPH FRANCIS SERVER

LAWRENCE RUBEN BARBA
(Attorney of Record)

ATTORNEYS FOR PETITIONER
TED BERKIC

Annexed:

"A" District Court Findings of Fact and Conclusions of Law - filed December 11, 1983

"B" Opinion of the Ninth Circuit - filed March 11, 1985

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TED BERKIC, Plaintiff, v. MICHAEL CRICHTON, et. al., Defendants.	No. Cv. 83-1287 Kn (Kx) FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

1. Prior to 1972, the plaintiff Ted Berkic wrote a screenplay, entitled "REINCARNATION, INC."

2. In February, 1978, the defendant MGM/UA Entertainment Company produced a motion picture entitled "COMA," the screenplay for which was written by the defendant Michael Crichton.

3. Any finding of fact which shall be deemed a conclusion of law is hereby adopted as such.

CONCLUSIONS OF LAW

4. The Court has jurisdiction over the present action under 29 U.S.C. § 1338.

5. To establish copyright infringement, plaintiff must prove three elements: (1) ownership of copyright; (2) access to the copyrighted work; and (3) substantial similarity between the copyrighted work and the defendant's work. Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977). For purposes of this motion, defendants do not contest the first two requirements.

6. The determination of whether defendants' work (COMA) is substantially similar to plaintiff's (REINCARNATION, INC.) turns upon two tests: (1) an "extrinsic" test, turning upon objective criteria such as plot, themes, subject matter, setting, mood, etc.; and (2) an "intrinsic" test, based upon the subjective

response of the ordinary reasonable person. Krofft, supra; see also Jason v. Fonda, 526 F.2d 774, 777 (C.D. Cal. 1981), aff'd., 698 F.2d 966 (9th Cir. 1982).

7. The extrinsic test is applied in determining substantial similarity of idea. The intrinsic test is applied in determining substantial similarity in expression of that idea.

8. In this case, the extrinsic characteristics of the works include the plot, themes, setting, and mood. With the exception of plot, a close examination of these criteria reveals a vast difference between the two works. The plots are similar in the essence of the works, i.e., the illegal selling of human body parts to the highest bidder. Beyond this, the Court finds that the themes, setting, and mood of the two works are dissimilar. For example, the setting of COMA is a hospital in Boston

whereas REINCARNATION, INC. is set throughout the Los Angeles area. REINCARNATION, INC., perhaps because it was written in the late 60's and early 70's, reflects issues of concern during that time period and are critical to the screenplay, e.g., Vietnam, drugs, racial attitudes. COMA, on the other hand, does not evidence any of this.

9. Nevertheless, even if one could conclude that there was a substantial similarity of idea after applying the extrinsic test, plaintiff would still be required to satisfy the intrinsic test which is dependent upon the subjective response of the ordinary reasonable person. This requirement may be shown if the defendants' work captures the "total concept and feel" of plaintiff's work. Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970); see also Sid & Marty Krofft, supra, at 1167. The Court

concludes that no reasonable jury could conclude that COMA and REINCARNATION, INC., are substantially similar under an intrinsic test.

10. Any conclusions of law which shall be deemed a finding of fact is hereby adopted as such.

DATED: This 16th day of December, 1983.

DAVID V. KENYON

United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TED BERKIC, Plaintiff-Appellant, v. MICHAEL CRICHTON, ROBIN COOK, MARVIN MOSS, METRO-GOLDWYN-MAYER/UNITED ARTISTS ENTERTAINMENT COMPANY Defendants-Appellees.	)	No. 84-5733 DC# CV 83-1287-KN *MEMORANDUM

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding
Argued and Submitted January 10, 1985

Before: SNEED, POOLE, and FERGUSON, Circuit Judges.

The plaintiff appeals the district court's judgment disposing by various means of his copyright and Lanham Act claims. We affirm.

*The panel has concluded that the issues presented by this appeal do not meet the standards set by 9th Cir. R. 21 for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit save as provided in Rule 21(c).

I.

FACTS AND PROCEEDINGS BELOW

In 1968, the plaintiff wrote a 54 page screen treatment that he called Reincarnation, Inc. Hoping to interest a studio in producing a film based on his work, he gave the screen treatment to a literary agent, defendant Marvin Moss, and asked for his help. Moss read Reincarnation and suggested that the plaintiff collaborate with defendant Michael Crichton on a "shared-credit" basis. The plaintiff declined the offer.

In 1978, defendant MGM/UA Entertainment Co. released the movie Coma, written and directed by Crichton, and based on a novel by the same title written by defendant Robin Cook. The novel is still in print and the movie has been and continues to be shown on cable television and is available on videocassettes and

videodiscs. The plaintiff alleges that both the movie and the book Coma were largely "adapted, derived, or copied" from his screen treatment Reincarnation.

In December 1980, the plaintiff brought suit in California state court alleging plagiarism, breach of implied-in-fact contract, and several other state causes of action. That complaint was dismissed on a demurrer and the dismissal was affirmed on appeal.

In March 1983, the plaintiff filed this lawsuit in federal district court alleging that Coma infringed his copyright in Reincarnation, and that by failing to credit his contribution to the novel or the movie, the defendants marketed their works under a false designation of origin and thus violated the Lanham Act's prohibition of unfair competition.

On July 1, 1983, the district court dismissed the copyright claim as time-barred to the extent that it was based on actions occurring more than three years before the claim was filed in federal court. The district court then dismissed the Lanham Act claim in its entirety. Although the court's order did not state the reason for the dismissal, the district judge explained at the hearing on the defendants' motion to dismiss that the plaintiff has failed to state a claim on which relief could be granted because he could not establish the requisite element of "secondary meaning."

On December 16, 1983, the district court disposed of the remainder of the plaintiff's copyright claim by granting summary judgment for the defendants on the ground that no reasonable jury could conclude that Coma and Reincarnation were

substantially similar.

We shall address the substantial similarity issue. Because we affirm the district court's disposition of this issue, we need not reach the other issues raised by the plaintiff on this appeal.[1]

II

SUBSTANTIAL SIMILARITY

To establish a successful copyright claim, a plaintiff must show: (1) his ownership of the coypright; (2) the defendant's access to his work; and (3) "substantial similarity" between the defendant's work and his own. See Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977). For purposes of their summary judgment motion only, the defendants stipulated the plaintiff's ownership of the copyright and their access to his work, but argued that, as a matter of law,

there was no substantial similarity between Reincarnation and Coma. On appeal, the district court's judgment granting that motion, and the findings that support it, are subject to our de novo review. Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327, 1328 (9th Cir. 1983).

A. The Test For Substantial Similarity.

We have broken the test for substantial similarity into two parts. The first part, the "extrinsic test," is used to determine whether two works are substantially similar in their "general ideas." The extrinsic test is objective; it

> depends not on the responses of the trier of fact, but on specific criteria which can be listed and analyzed. Such criteria include the

type of artwork involved, the materials used, the subject matter, and the setting for the subject. Since it is an extrinsic test, analytic dissection and expert testimony are appropriate.

Krofft, 562 F.2d at 1164. The extrinsic test compares the individual features of the works; it looks to find specific, articulable similarities between the plot, themes, dialogue, mood, setting, pace, characters, and sequence of events. Litchfield v. Spielberg, 736 F.2nd 1352, 1356-57 (9th Cir. 1984).

The second part of the substantial similarity inquiry, the "intrinsic test," is used to determine whether two works are substantially similar in their "forms of expression." The intrinsic test is subjective; it depends solely "on the response of the ordinary reasonable

person." Krofft, 562 F.2d at 1164. To that extent, expert testimony or the comparison of individual features of the works is inappropriate in applying the intrinsic test. Rather, the trier of fact ordinarily decides whether the "total concept and feel" of the two works is substantially similar. In comparing two films, for example, or a film with a written work, the proper question in applying the intrinsic test is whether the ordinary, reasonable audience would recognize the defendant's work as a "dramatization" or "picturization" of the plaintiff's work. Litchfield, 736 F.2d at 1357.

To prevail on a copyright claim, a plaintiff must show substantial similarity of both ideas and expression. Id. at 1356. In this case, the district court found as a matter of law that Coma

and Reincarnation were substantially dissimilar, both in idea and in expression. We agree.

B. Disposition By Summary Judgment.

It is true that as a general rule, summary judgment is not highly favored on the substantial similarity issue in copyright cases. See Litchfield, 736 F.2d at 1355 ("Substantial similarity is usually an extremely close issue of fact and summary judgment has been disfavored in cases involving intellectual property."); Jason V. Fonda, 526 F. Supp. 774, 777 (C.D. Cal. 1981), incorporated by reference, 698 F.2d 966 (9th Cir. 1982) ("Substantial similarity in copyright infringement actions is a question of fact uniquely suited for determination by the trier of fact."). But the plaintiff is wrong to suggest that summary judgment can

never be properly granted on the substantial similarity issue. Indeed, "no special standard is employed in determining whether summary judgment is appropriate on the issue of substantial similarity of expression in a copyright case." See v. Durang, 711 F.2d 141, 142 (9th Cir. 1983). Krofft emphasized that the question whether there is substantial similarity of ideas between two works "may often be decided as a matter of law." 562 F.2d at 1164. And, since Krofft, we have frequently affirmed summary judgments in favor of copyright defendants on the substantial similarity issue. See Litchfield, 736 F.2nd at 1358 (upholding summary judgment on ground that no reasonable jury could find substantial similarity); See v. Durang, 711 F.2d at 142 (same); Jason, 526 F. Supp. at 777, incorporated by reference, 698 F.2d at 966

(same). Our independent review of Reincarnation and Coma leads us to the same result today.

C. The Extrinsic Test for Similarity of Ideas.

At a very high level of generality, the works do show a certain gruesome similarity. Both deal with criminal organizations that murder healthy young people, then remove and sell their vital organs to wealthy people in need of organ transplants. To some extent, both works take their general story from the adventures of a young professional who courageously investigates, and finally exposes, the criminal organization. But this degree of similarity between the basic plots of two works cannot sustain a plaintiff's claim that the works are "substantially similar." No one can own the basic idea for a story. General plot

ideas are not protected by copyright law; they remain forever the common property of artistic mankind. See Litchfield, 736 F.2d at 1357 (no copyright protection for general plot ideas); 3 M. Nimmer on Copyright § 13.03 [A] (1984).

The test for "substantial similarity of ideas" compares, not the basic plot ideas for stories, but the actual concrete elements that make up the total sequence of events and the relationships between the major characters. The extrinsic test for similarity of ideas looks beyond the vague, abstracted idea of a general plot and instead "focuses on... the objective details of the works... The extrinsic test requires a comparison of plot, theme, dialogue, mood, setting, pace, and sequence." Litchfield, 736 F.2d at 1356. See also Jason, 526 F. Supp. at 777. In this case, we believe that the

district court was correct in its judgment that no jury could reasonably conclude that plaintiff's Reincarnation and defendants' Coma were substantially similar in ideas.

In Reincarnation, for example, the main character does not, until very late in the story, participate in the investigation that exposes the criminal organization. Indeed, for most of Reincarnation, the plaintiff's Dr. Lampkin is a dupe of the criminal conspiracy. In Coma, Dr. Wheeler, who investigates the unexplained brain deaths of young, healthy patients, is moved to action by purely personal concerns: early in the story her best friend falls victim to the organization during a routine surgical procedure. In Reincarnation, on the other hand, Lieutenant DeNove, who investigates the mysterious disappearance of young women,

is seeking to advance his career as a police detective.

The settings of both works are also dissimilar. Most of the events in Coma take place in a large metropolitan hospital. Only a few, relatively minor scenes in Reincarnation are set in a hospital. Coma is replete with references to sophisticated medical technology. Reincarnation is a less technically intimidating, if more traditionally satisfying, detective story.

The major romantic relationship in Reincarnation, between Lieutenant DeNove and his wife, is a significant part of the story, and is used by the plaintiff to discuss the racial problems of the 1960's. The only romantic relationship in Coma, between Dr. Wheeler and her boyfriend, is not a major part of the story and is not used to treat larger social concerns.

Nevertheless, we recognize that there are some similarities between the works. The plaintiff argues that they raise at least a triable issue of fact on the substantial similarity of ideas issue. (We believe that the plaintiff's argument rests on a misunderstanding of the nature of the protection afforded by copyright law.) it is well established that, as a matter of law, certain forms of literary expression are not protected against copying. As noted earlier, the general idea for a story is among these. So too are all situations and incidents which flow naturally from a basic plot premise, so-called scenes a faire. See Jason, 526 F. Supp. at 777. Many of the similarities the plaintiff finds between Coma and his own work fall into this category of unprotectable expression. Many of the other similarities he lists -- including the

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No. 84-1977

In The

Supreme Court of the United States

October Term, 1984

TED BERKIC,

Petitioner,

v.

MICHAEL CRICHTON, ROBIN COOK, MARVIN MOSS, METRO-GOLDWYN-MAYER/ UNITED ARTISTS ENTERTAINMENT COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPPOSITION BY RESPONDENTS MGM/UA ENTERTAINMENT CO. AND MICHAEL CRICHTON TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents,[1] MGM/UA Entertainment Co. and Michael Crichton, oppose the Petition for Writ of Certiorari. Petitioner does not, and cannot, show that any special or important reasons exist to justify this Court's review of the issues decided by the lower courts in dismissing the copyright infringement claim on motion for summary judgment.

OPINIONS BELOW

The March 11, 1985 unpublished Memorandum by the Court of Appeals, petition ("pet.") App. A-6 to -24, has since been certified for publication by that court's order of May 25, 1985 and is reported at 761 F.2d 1289 (9th Cir. 1985).

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the provisions referred to in the petition, this case involves:

First Amendment

"Congress shall make no law . . . abridging the freedom of speech . . ."

STATUTES INVOLVED

In addition to the statutes referred to in the petition, this case involves 17 U.S.C. Section 102(b) which pro-

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[1] MGM/UA Entertainment Co. has the following partially owned subsidiaries and/or affiliates: Carwin Music, Inc.; Danjaq S.A.; Unitedprod S.A.; MGM/UA Entertainment Distributing Co.; MGM/UA Entertainment Releasing Co.

vides in relevant part that "in no case does copyright protection for an original work of authorship extend to any idea . . . [or] concept . . . regardless of the form in which it is described, explained, illustrated, or embodied in such work."

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COUNTERSTATEMENT OF THE CASE

In February, 1978, respondent MGM/UA Entertainment Company produced a motion picture entitled "COMA," from a screenplay written by Michael Crichton.

On March 3, 1983, petitioner, Ted Berkic, ("Berkic" hereafter) commenced his civil action. Berkic's amended complaint ("complaint" hereafter) alleged that the "COMA" motion picture, and a book of the same title written by the defendant Robin Cook, infringed his copyrighted screenplay, "Reincarnation" ("Reincarnation" hereafter), and that because defendants did not give Berkic any credit in the book or movie as a creator of "COMA," the defendants misrepresented story authorship in violation of Lanham Act section 43(a), 15 U.S.C. § 1125(a).

Jurisdiction in the district court for the copyright infringement and Lanham Act claims was based on 28 U.S.C. section 1338(a).

A. Partial Dismissal Of Complaint

On April 11, 1983, defendants moved to dismiss Berkic's second claim in its entirety, on the ground that it incurably failed to allege the requisite element of secondary meaning under the Lanham Act. Defendants also

moved to dismiss the first claim to the extent that it rested upon publications made more than three years before the complaint was filed, on the grounds that such claims were barred by the statute of limitations.

On July 1, 1983, the district court granted defendants' Motion to Dismiss the second claim in its entirety, and the requested portion of the first claim.

B. Order Granting Summary Judgment

On August 4, 1983, defendants moved for summary judgment on Berkic's copyright infringement claim. For sake of argument only, defendants allowed the Court to assume "access," but asked the Court to find as a matter of law that no actionable similarity existed.[2] The supporting papers to the Motion attached copies of "Reincarnation" and the continuity[3] for "COMA." Berkic responded, in part, by filing a cross-motion seeking summary judgment on the issue of liability. The court viewed the film "COMA," read the submitted materials and

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[2] The assumption that access existed is commonly made to simplify summary judgment motions because a defendant may legitimately avoid infringement by intentionally making sufficient changes in a work to avoid substantial similarity. *E.g., Litchfield v. Spielberg,* 736 F.2d 1352, 1357 (9th Cir. 1984) *cert. denied,* 105 S.Ct. 1753, 84 L.Ed.2d 817 (1985); *Warner Bros., Inc. v. American Broadcasting Companies, Inc.,* 720 F.2d 231, 241 (2d Cir. 1983); 3 M. Nimmer, *Nimmer on Copyright* § 13.03[B] at 13-14 (1985) ["Nimmer" hereafter]. "Copying deleted or so disguised as to be unrecognizable is not copying." *See v. Durang,* 711 F.2d 141, 142 (9th Cir. 1983).

[3] The "continuity" is a written version of the motion picture that contains dialogue and a written description of the action prepared from the finished film. See *Dellar v. Samuel Goldwyn, Inc.,* 104 F.2d 661, 662 (2d Cir. 1939), 150 F.2d 612 (2d Cir. 1945), *cert. denied,* 327 U.S. 790 (1946).

heard oral argument before taking the cross-motions under submission.

On December 19, 1983, the district court filed Findings of Fact and Conclusions of Law and entered an Order Granting Defendants' Motion for Summary Judgment, thereby disposing of Berkic's remaining claims.[4]

The district court found that neither the general ideas nor the expression in "COMA" was substantially similar to the general ideas and protectible expression in "Reincarnation." Findings, pet., App. A-3 to -4.

Berkic's petition raises questions concerning only the claim for copyright infringement. Reviewing the propriety of summary judgment on that claim *de novo*, and viewing the inferences in the light most favorable to the plaintiff, pet., App. A-12, the court of appeals affirmed the judgment of dismissal applying the *extrinsic* and *intrinsic* tests required in the Ninth Circuit by *Sid & Marty Krofft Television Prods. v. McDonald's Corp.*, 562 F.2d at 1157, 1162-64 (9th Cir. 1977) (*"Krofft"* hereafter). Pet. App. A-12 to -14. The court of appeals first analyzed the works under an *extrinsic* test that focused on the objective "general ideas" of the works: the characters, plot, theme, dialogue, mood, setting, pace, and sequence of events. In comparing the "actual concrete elements that make up the total sequence of events and the relationships between the major characters", it found no substantial similarity of the general ideas. Pet. App. A-18 to -19. Secondly, applying the *intrinsic* test, the likely subjective response by the intended audience, it found

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[4] At that time, the Court also denied Berkic's cross-motion.

that reasonable minds could not differ as to the absence of substantial similarity in expression because the total concept and feel of the works was completely different: no lay observer would recognize "COMA" as a dramatization or picturization of "Reincarnation". Pet. App. A-23.

The court of appeals also rejected as "frivolous" Berkic's claim that "COMA" infringed Berkic's copyright to make derivative works of "Reincarnation" under 17 U.S.C. § 106(2) if it appeared that "COMA" was "based upon" "Reincarnation" even though no "substantial similarity of expression" existed. Pet. App. A-23 n.1.

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REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate the existence of "special and important reasons"[5] justifying review of the court of appeals' decision.

The only question properly raised below by petitioner was whether the "derivative works" right under § 106(2) of the 1976 Copyright Act, 17 U.S.C. § 106(2) worked a substantial change in the law to replace the substantial similarity standard with a "based upon" standard to determine infringement. The court of appeals in this case rejected the claim as "frivolous", relying upon its previous holding to the same effect in *Litchfield v. Spielberg*, 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 1753, 84 L.Ed.2d 817 (1985) ("Litchfield" hereafter). Petitioner here is represented by the same lawyers who

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[5] Supreme Court Rule 17.1.

represented the petitioner in *Litchfield*. Faced with the overwhelming rejection of their previous theory regarding derivative works, they have invented another which seeks an equivalent result: that Congress intended to create a special rule making the use of abstract ideas from an underlying work an infringement of the right to make derivative works.

The rest of the petition never comes to any point and simply invites this Court either to write a treatise on general copyright law or to engage in a review of evidentiary issues which would have no precedential value.

I.

THE COURT OF APPEALS DECISION APPLYING THE SUBSTANTIAL SIMILARITY STANDARD TO DETERMINE INFRINGEMENT NEITHER CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS NOR INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

Petitioner argues that the courts are confused about their application of the "substantial similarity" standard. Pet. 18. He argues that some circuits apply this standard without reference to the idea/expression dichotomy whereas others apply it in light of that dichotomy. Pet. 43-53. From this he argues that a conflict exists among the circuits.

The elements of proof of copyright infringement are (1) plaintiff's ownership of the copyright, and (2) defendants' copying of protectible expression from plain-

tiff's work.[6] *Krofft, supra,* at 1162; 3 M. Nimmer, *Nimmer on Copyright* § 13.01 at 13-3, and § 13.01[A], at 13-6 (1985) (*"Nimmer"* hereafter).

"Copying" is a necessary, but not sufficient, element to prove infringement; what was copied must also constitute *expression. Krofft, supra,* at 1162-63; 3 *Nimmer* § 13.03[A] at 13-20 to -21. The three evidentiary methods of proving infringement may be charted as follows:

I	II	III
Direct evidence of copying[7]	Circumstantial evidence of copying (access and substantial similarity of ideas or expression)[8]	Circumstantial evidence of copying (striking similarity)[9]
+	+	+
Substantial similarity of expression	Substantial similarity of expression	Substantial similarity of expression

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6 "Substantial similarity" of expression means that the amount of protectible expression copied must be more than *de minimis. See, e.g., Knickerbocker Toy Co. v. Azrak-Hamway Intern.,* 668 F.2d 699, 703 (2d Cir. 1982); *Rokeach v. Avco Embassy Pictures Corp.,* 197 U.S.P.Q. 155, 161 (S.D.N.Y. 1978) (use of isolated sentence fragments *de minimis).* However, when the alleged infringement refers to so-called non-literal comprehensive copying, "substantial similarity" also connotes a policy determination that defendant's paraphrasing of structure and detail is so comprehensive and sufficiently concrete as to borrow the "expression" and not just the "idea" of the plaintiff's work. 3 *Nimmer,* § 13.03[A] at 13-18 to -34.

7 *Landsberg v. Scrabble Crossword Game Players, Inc.,* 736 F.2d 485 (9th Cir.), *cert. denied,* 105 S.Ct. 513, 83 L.Ed.2d 403 (1984) (*"Landsberg"); Gethers v. Blatty,* 283 F.Supp. 303 (C.D. Calif 1968).

8 *Krofft, supra.*

9 *Schultz v. Holmes,* 264 F.2d 942, 943 (9th Cir. 1959).

In accordance with the idea-expression dichotomy of copyright law,[10] the requirement of "substantial similarity" is not satisfied simply by similarities in the *ideas* in the works; there must be substantial similarity in *expression* of those ideas as well. In *Krofft,* the Ninth Circuit recognized that protectible expression has two aspects: the *extrinsic,* which is capable of objective analysis, and the *intrinsic,* which depends on the audience's subjective response. Thus, the Ninth Circuit beginning with *Krofft* initiated a two-step process to analyze the substantial similarity issue: there must be substantial similarity as to both the *"general ideas"* (not synonymous with "idea") of the works in question (the *"extrinsic test"*) and the protectible expression of those general ideas (the *"intrinsic test"*). *Krofft,* 562 F.2d at 1164; *Litchfield,* 736 F.2d at 1355-57.

Thus, substantial similarity of protectible expression is a material element under each of the three alternative methods of proving infringement, and, if no reasonable jury could find substantial similarity of protectible expression, then defendants are entitled to summary judgment. *Litchfield,* 736 F.2d at 1355-1356; *Jason v. Fonda,* 698 F.2d 966 (9th Cir. 1982), incorporating 526 F.Supp. 774 (C.D. Cal. 1981) (*"Jason"*).

Thus, the only "confusion" claimed by petitioner, pet. 20-21, arises from his failure to understand or acknowledge

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[10] The "idea-expression dichotomy" is an axiom of copyright law: protection is given only to the particular expression of ideas, never to the ideas themselves. 17 U.S.C. § 102(b); *Mazer v. Stein,* 347 U.S. 201, 217 (1954). The idea/expression dichotomy is mandated by First Amendment principles. *Krofft, supra* at 1170; 1 *Nimmer,* § 1.10[B] at 1-76 to 78.

that "similarity" has a different focus and thus meaning depending on whether the issue is (a) copying or (b) actionable similarity.

In determining whether any copying has occurred, the combination of access and *any* similarities may give rise to the inference that whatever similarities exist in the works resulted from copying. *E.g., Arnstein v. Porter,* 154 F.2d 464, 468, 472 n.18 (2d Cir. 1946).

On the other hand, even though similarities admittedly exist in a defendant's work because of copying, they are not actionable unless they occur on the level of "expression" and not just "idea". *Warner Bros. Inc. v. American Broadcasting Companies, Inc.,* 720 F.2d 231, 239 (2d Cir. 1983). Actionable similarity thus requires "substantial similarity of expression."

Consequently, as noted in *Universal Athletic Sales Co. v. Salkeld,* 511 F.2d 904 at 907 (3d Cir. 1975):

> But, substantial similarity to show that the original work has been copied is not the same as substantial similarity to prove infringement. As the *Arnstein* case points out, dissection and expert testimony in the former setting are proper but are irrelevant when the issue turns to unlawful appropriation. While "[r]ose is a rose is a rose is a rose", substantial similarity is not always substantial similarity.

Thus, petitioner is incorrect, pet. 43-54, to argue that a conflict exists among the circuits regarding the proper application of the standard to determine actionable similarity. The circuits referred to by petitioner are unanimous in holding that actionable similarity (1) depends upon the lay observer's reaction to the works (the "audience test") and that (2) only similarity of "expression"

as opposed to "ideas" is actionable. *Warner Bros. Inc. v. American Broadcasting Companies, Inc., supra,* 720 F.2d at 239-244; *Universal Athletic Sales Co. v. Salkeld, supra,* 511 F.2d at 907-08; *Atari, Inc. v. North American Philips Consumer Electronics Corp.,* 672 F.2d 607, 614-16 (7th Cir. 1982); *Krofft, supra,* 562 F.2d at 1163-65.

The lower courts here applied rules regarding the substantial similarity of expression which are consistent with the rules applied by all circuit courts of this country.

II.

THE COURT OF APPEALS DECISION REFUSING TO REPLACE THE SUBSTANTIAL SIMILARITY STANDARD WITH A "BASED UPON" STANDARD TO DETERMINE INFRINGEMENT OF THE "DERIVATIVE WORKS" RIGHT GRANTED BY 17 U.S.C. § 106(2) NEITHER CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS NOR INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT.

In the lower courts, petitioner's argument was different than that raised in the Petition. Below, he argued that something less than substantial similarity of expression would suffice to infringe the derivative work right. Berkic Brief at 35-40, *Berkic v. Crichton,* No. 84-5733 (9th Cir.). Perhaps because of the fate of this claim urged by the same counsel in *Litchfield v. Spielberg, supra,* the petition changes the argument's focus somewhat, but it comes to the same conclusion.

Petitioner now argues for the first time that the 1976 Copyright Act prohibition against protection of ideas, 17 U.S.C. § 102(b), was intended to apply only to so-called

"practical" as opposed to "artistic works". Pet. 8-10. He next argues that Congress' grant of an author's or proprietor's right to control the making of derivative works, 17 U.S.C. section 101 (definition of "derivative work") and section 106(2), was primarily designed to protect "artistic" works and not "practical" works. Pet. 10. From this he concludes that it must follow that "the derivative works' statute makes 'a string of ideas' in the aggregate the equivalent of expression." Pet. 17. This is simply petitioner's old "based upon" argument which contends that petitioner need not show the works are substantially similar as to their protectible expression.

Neither section 102(b) of the Copyright Act nor its judicial precedents distinguishes, defines or limits itself to "practical" works rather than "artistic" works. 17 U.S.C. 102(b) ("In no case . . . does copyright protection . . . extend to an idea . . ."); House Report No. 94-1476, as reprinted in 17 U.S.C.A. § 102 at 17 (1977); 1 *Nimmer*, § 1.10[B] at 1-74. Nor is the derivative works' right limited solely or primarily to "artistic" works. 17 U.S.C. § 101 (definition of "derivative work"); 17 U.S.C. § 106(2) and House Report No. 94-1476, as reprinted in 17 U.S.C. § 106 (1977). Thus, there is no statutory support for petitioner's argument that the "derivative work" rights protection was intended to expand an author's copyright monopoly to "ideas" or to anything less than "protectible expression". As Professor Nimmer notes:

> [T]he term derivative work in a technical sense does not refer to all works which borrow in any degree from pre-existing works. A work is not derivative unless it has substantially copied from a prior work. If that which is borrowed consists merely of ideas and not the expression of ideas, then although the work

> may have in part been derived from prior works, it is not a derivative work.

1 *Nimmer*, § 3.01 at 3-3. See also, *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1329 n. 4 (9th Cir. 1983); *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). No courts have held otherwise.

Finally, petitioner's argument that a "string of ideas" may constitute protectible expression depends for its force on its practical application. If petitioner is referring in his argument to abstract "ideas", he is plainly wrong. The string of ideas:

(1) Boy meets girl;

(2) Boy loses girl;

(3) Boy and girl reconcile;

(4) Boy and girl live happily ever-after . . .

is not copyrightable. See, *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 105 S.Ct. 513, 83 L.Ed.2d 403 (1984). If petitioner defines his "string of ideas" in concrete terms (expressing the ideas by means of characters and a sequence of events in a story), his ideas then become protectible expression. But by the same turn, the scope of his protection is defined by that concrete form of expressing such ideas. *Krofft*, 562 F.2d at 1163.

III.

NO SPECIAL OR IMPORTANT REASONS JUSTIFY THIS COURT'S REVIEW OF THE RECORD BELOW TO DETERMINE WHETHER THE LOWER COURTS PROPERLY APPLIED THE SETTLED RULES OF SUBSTANTIAL COPYRIGHT LAW.

After wading through the extravagant and contradictory claims in the petition, one must conclude that petitioner's real lament is that the lower courts wrongly applied the settled rules of law to the particular facts presented, not that the courts applied the wrong rules.

Petitioner variously argues that the lower courts erred in their applications of law concerning (1) the significance of any similarities, pet. 31-37, (2) the use of expert testimony about similarities, pet. 37-39, and (3) the existence and significance of an alleged "error" common to both plaintiff's and defendants' works. Pet. 40-42.

A. *Existence And Significance Of Alleged Similarities.*

Review of the question whether the lower courts properly analyzed the subject works to determine whether substantial similarity of protectible expression *(i.e.,* actionable similarity) existed is not likely to provide any precedential value. After decades of writing leading copyright opinions, Judge Hand concluded:

> Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea', and has borrowed its 'expression'. Decisions must therefore inevitably be *ad hoc.*

Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960).

B. *Effect Of Expert Testimony Regarding Similarity.*

The lower courts' decisions not to follow expert testimony proffered on the actionable similarity issue was consistent with the decisions in all circuits. Since defendants in this case conceded access and copying for sake of the summary judgment — leaving only the question of actionable similarity, no expert testimony was permissible on that issue. *Arnstein v. Porter,* 154 F.2d 464, 468 (2d Cir. 1946); *Universal Athletic Sales Co. v. Salkeld,* 511 F.2d 904, 907 (3d Cir. 1975); *Atari, Inc. v. North American Philips Consumer Electronics Corp.,* 672 F.2d 607, 614 (7th Cir. 1982); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.,* 562 F.2d 1157, 1164 (9th Cir. 1977).

C. *Common Error.*

The existence or significance to be given an alleged common error in the works raises no significant issue requiring review by this Court. Moreover, the lower courts properly decided the issue in this case.

The District Court found that the common error issue was not even raised in a timely fashion. Order, 2/28/84. But, even if a single common error existed, it is only relevant to the copying issue — conceded by defendants' motion for sake of argument — not whether the works were substantially similar in their protectible expression. 3 *Nimmer,* § 13.03[C] at 13-44 and text ac-

companying note 81; *Schultz v. Holmes,* 264 F.2d 942, 943 (9th Cir. 1959).

IV.

RESPONDENTS ARE ENTITLED UNDER SUPREME COURT RULE 49.2 TO AN AWARD OF ATTORNEY'S FEES AND COSTS INCURRED IN RESPONDING TO THE PETITION.

The court of appeals appropriately described as "frivolous" the section 106(2) issue raised by petitioner. Pet. App. A-24n.1. None of the other issues raised by the petition comes any closer to presenting "special and important reasons" justifying review of the lower courts' decisions.

Respondents are mindful of the Court's reluctance to assess costs against parties or their counsel under Rule 49.2. *Palamini v. All State Insurance Co.,* 470 U.S. —, 85 L.Ed.2d 125, 105 S.Ct. 1825 (1985) (denial of petition for writ of certiorari). However, this case presents an unusually compelling case, requiring relatively little analysis.[11] Both counsel for petitioner here raised precisely the same 106(2) argument to the Ninth Circuit Court of Appeals twice—in this case and in *Litchfield v. Spielberg,* 736 F.2d 1352, 1357 (9th Cir. 1984), *cert. denied,* 105 S.Ct. 1753, 84 L.Ed. 2d 817 (1985). On both occasions, that court ruled

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[11] Petitioner's arguments are not only frivolous but they are presented in such a careless manner as to evidence the sole purpose to put defendants to the expense of opposing the petition. For example, the "quote" cited at page 59 of the petition from the *Twentieth Century* decision, 715 (erroneously cited as 715) F.2d 1327 does *not* appear in that opinion. The petition also omits to inform this Court that the *Sherry* district court opinion relied on by petitioner, pet. 27, was reversed. 753 F.2d 1565 (11th Cir. 1985).

the argument was "frivolous". Now, for a second time in six months they present the same issue to this Court.

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V.

CONCLUSION

For all the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari ought to be denied and that respondents ought to be awarded their reasonable attorneys' fees and costs.

Dated: July 9, 1985.

Respectfully submitted,

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depictions of the small miseries of domestic life, romantic frolics at the beach, and conflicts between ambitious young people on one hand, and conservative or evil bureaucracies on the other -- are also unprotectable. These familiar scenes and themes are among the very staples of modern American literature and film. The common use of such stock cannot raise a triable issue of fact on the plaintiff's copyright claim. It merely reminds us that in Hollywood, as in the life of men generally, there is only rarely anything new under the sun. Taken separately or together, the common features of Coma and Reincarnation do not allow a reasonable inference that the works are substantially similar in their ideas.

D. The Intrinsic Test for Similarity of Expression.

Nor did the district court err in the application of the intrinsic test. We agree that Coma and Reincarnation are not substantially similar in their form of expression. Our own, independent review of the works satisfies is that they are substantially dissimilar in "the mood evoked... as a whole," see See v. Durang, 711 F.2d at 144, and in the "total concept and feel of the works," see Litchfield, 736 F.2d at 1357. We are confident that no reasonable reader or moviegoer would recognize either the book or movie Coma as a "picturization" or "dramatization" of Reincarnation. See id. at 1357.

AFFIRMED.

FOOTNOTE

1. On this appeal the plaintiff argues that the district court's partial dismissal of his copyright claim on statute of limitations grounds was erroneous. Even if the plaintiff's arguments concerning the statute of limitations are correct, it would be useless to remand the copyright action. Our affirmance of the grant of summary judgment on the substantial similarity issue precludes recovery on any part of the copyright claim. Similarly, we believe that our holding that as a matter of law there is no substantial similarity between Reincarnation and Coma disposes of the plaintiff's Lanham Act claim. "[W]ithout substantial similarity there can be no claim for reverse passing off under section 43(a) [of the Lanham Act]." Litchfield v. Speilberg, 736 F.2d 1352, 1358 (9th Cir. 1984). Finally, the plaintiff's argument that his "derivative work" copyright claim presents issues separable from his main copyright claim is frivolous. If the plaintiff cannot show a substantial similarity between the defendants' work and his own, he cannot prevail on a claim for alleged violations of his right to prepare derivative works. See id. at 1357.

AFFIDAVIT OF MAILING

I, Lawrence R. Barba, a member of the Bar of the Supreme Court of the United States and counsel of record for Ted Berkic, petitioner herein, hereby certify that on June 7, 1985, pursuant to Rule 33, Rules of the Supreme Court, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the respondents herein, by depositing such copies in the United States Post Office, Beverly Hills, California, with first class postage prepaid, properly addressed to the Post Office address of Louis Petrich of Youngman, Hungate & Leopold, the respondents' counsel of record, at 2049 Century Park East, Suite 3110, Los Angeles, California 90067.

All parties required to be served have been served.

DATED: June 7, 1985

Lawrence R. Barba
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Beverly Hills, CA 90212

Proof of Service by Mail

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 9701 Wilshire Boulevard, 8th floor, Beverly Hills, California 90212; that on June 7, 1984, I served the within Petition for Writ of Certiorari in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

(Original and 40 copies)

Louis P. Petrich
Youngman, Hungate & Leopold
2049 Century Park East, Suite 3110
Los Angeles, California 90067
(3 copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 7, 1985, at Los Angeles, California.

Joanna Bloem

Joanna Bloem
(Original signed)